EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2020-292-000251
[2021] NZYC 184

NEW ZEALAND POLICE
Prosecutor

v

[WR]
Young Person

Hearing: 30 March 2021

Appearances: Y Olsen for Prosecution
J Olsen for the Young Person

Judgment: 6 May 2021

RESERVED JUDGMENT OF JUDGE S PATEL

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[1] The young person [WR] faces four charges of sexual violation by unlawful sexual connection. The complainant is [PG].

[2] I need to determine an application by the defence for a dismissal of the charges for undue delay pursuant to s 322 of the Oranga Tamariki Act 1989 (the Act). This is the second such application, Judge Recordon having dismissed the first application.[1] His Honour's decision outlined the background to the alleged offending.[2]

The scope of the hearing

[3] One District Court Judge does not have the power to depart from the pre-trial ruling made by another District Court Judge, unless there is a relevant change in circumstances.[3]

[4] The Crown accepts that there is a charge of circumstances that permits me to hear the application. I agree. The change of circumstances is the seven months that will pass between the hearing of the first application on 2 November 2020 and the proposed trial date of 8 June 2021.

Section 322 of the Oranga Tamariki Act 1989

Which version of the Act applies?

[5] This issue is relevant to determine the youth justice principles that apply to the s 322 determination.

[6] The allegations are from 2017. [WR] was charged on 14 August 2020. This was after an amendment to the Act on 1 July 2019.

[7] Counsel for [WR] submitted that the applicable youth justice principles are those in force prior to the amendment of the Act. As determined by Judge Recordon, I consider the current version of the Act applies.[4] His Honour's determination of this

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[1] *New Zealand Police v [WR]* [2021] NZYC 11.
[2] At [48] and [49].
[3] *M (CA245/2015) v R* [2015] NZCA 413
[4] *New Zealand Police v [WR]*, above n1, at [6] – [10].

issue is reinforced by the decision of *R v DG*.[5] Judge Recordon's decision is also in accordance with clause 20 of the transitional provisions in schedule 1AA of the Act which provides that the new legislation applies to 17 year olds for alleged offending prior to the 1 July 2019 amendment of the Act.

[8] Accordingly, s 4A, s 5 and s 208 of the current Act apply.

Section 322 of the Act

[9] Section 322 provides:

> **322 Time for instituting proceedings**
>
> A Youth Court Judge may dismiss any charge charging a young person with the commission of an offence if the Judge is satisfied that the time that has elapsed between the date of the commission of the alleged offence and the hearing has been unnecessarily or unduly protracted.

"The hearing"

[10] I have determined that "the hearing" is the date of the trial in the Youth Court on 8 June 2021. This interpretation accords with *Attorney-General v Youth Court at Manukau.*[6]

Two stage approach

[11] In the current application it was not argued there had been unnecessary delay as had been argued at the first s 322 application. The focus in this hearing was whether there had been undue delay.

[12] First, I must assess whether there has been undue delay. If so, I must decide whether the residual discretion should be exercised to dismiss the charges.[7]

The timeframes

[13] The relevant time frames are:

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[5] *R v DG* [2021] NZHC 438 at [53].
[6] *Attorney-General v Youth Court at Manukau* [2007] NZFLR 103 (HC) at [48].
[7] *R v M* [2020] NZCA 539 at [30].

(a) The time between the first alleged offence and the trial (1 July 2017 to 8 June 2021) being 47 months.[8]

(b) The time between the first alleged offending and the complaint to the police (1 July 2017 to 27 February 2020) being 31 months.

(c) The time between the date of the complaint to the police and the referral for the s 247(b) Family Group Conference (27 February 2020 to 18 May 2020) being 2 months and three weeks.

(d) The time between the referral for the s 247(b) Family Group conference and the first appearance in the Youth Court (18 May 2020 and 14 August 2020) being 3 months.

(e) The time between the first Youth Court appearance and the hearing (14 August 2020 to 8 June 2021) being 10 months and three weeks.

(f) The time between the hearing of the first s 322 application and the hearing (between 2 November 2020 and 8 June 2021) being 7 months.

[14] Judge Recordon considered that as at the hearing of the application there had not been undue delay.[9] His Honour went on to say:

> [39] For completeness I note that, even if I had reached a finding of unnecessary or undue delay, I would not be inclined to exercise the discretion to dismiss.

[15] Given His Honour's ruling I consider that the issue for me to determine is whether the additional seven months in period (f) above, has resulted in there being undue delay. That time must however be considered having regard to the overall time frames.

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[8] In *EW v Police* at [26] the date of the offending was calculated from the end of the alleged period of the offending. My approach is not consistent with that.

[9] *New Zealand Police v [WR], above n1,* at [34]-[38].

Undue delay principles

[16] From the relevant authorities it emerges that the test for unreasonable delay involves the consideration of the following factors:[10]

(a) The length of the delay;

(b) Waiver of time periods;

(c) The reasons for the delay including inherent time requirements, actions of the defendant, actions of the Crown, and limits on institutional resources;

(d) Prejudice to the defendant.

[17] Whether there has been undue delay must turn on the facts of each case and the period of delay is not determinative. Comparisons with the length of delay in other cases will be unlikely to be of assistance.[11]

[18] In *H v R* the Supreme Court stated:[12]

> [44] We agree that the term "unduly protracted" does not, however, import a notion of fault. Whether the time elapsed has been unduly protracted must be considered from the perspective of the accused and may also depend on the application of the particular youth justice principles at issue. If an accused is still young, a relatively short delay may be considered unduly protracted, whereas such a delay would not be protracted for an older accused. Indeed, depending on the circumstances even long delays may not be considered unduly protracted for an older accused.

Has there been undue delay?

[19] The Crown submits that the delay is not undue. It is submitted that an early trial date has been obtained and the additional seven months from the hearing of the first s 322 application and the prospective trial date has not tipped the balance into an unduly protracted delay.

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[10] *Attorney General v Youth Court at Manukau*, above n6, at [52]; *R v M,* above n7, at [34].
[11] *R v M,* at n10, at [57].
[12] *H v R* [2019] NZSC 69 at [44].

[20] However, I consider that the delay is undue. [WR] was [under 15] at the time of the alleged offending. Almost four years will have passed as at the time of trial. That period is significant when viewed from [WR]'s perspective and considering the principle that decisions involving young persons should be made and implemented promptly and in a time frame appropriate to their age as provided by s 5(1)(b)(v) of the Act.

The residual discretion

[21] The ss 4A(2), and s 5 factors need to be considered in deciding whether or not to dismiss a charge under s 322. However, those factors will weigh more heavily when exercising the residual discretion.[13] Section 4A provides:

> **4A Well-being and best interests of child or young person**
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> (1) In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in sections 5 and 13.
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> (2) In all matters relating to the administration or application of Parts 4 and 5 and sections 351 to 360, the 4 primary considerations, having regard to the principles set out in sections 5 and 208, are—
>
> (a) the well-being and best interests of the child or young person; and
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> (b) the public interest (which includes public safety); and
>
> (c) the interests of any victim; and
>
> (d) the accountability of the child or young person for their behaviour.

[22] The relevant part of s5 provides:

> **5 Principles to be applied in exercise of powers under this Act**
>
> Any court that, or person who, exercises any power under this Act must be guided by the following principles:
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> ……
>
> (b)

[13] *R v DG*, n5, at [68].

(v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:

……..

(2) Subsection (1) is subject to section 4A.

Section 208(1) provides that that a Court in exercising powers under the act, including s322, "must weigh the 4 primary considerations described in section 4A(2)."

Defence submissions

The seriousness of the allegations

[23] The defence submits that the seriousness of the allegations ought to be considered having regard to the evidence. It is submitted:

> 88. In the circumstances, while the offending is *prima facie* serious, the allegations are not on the face of it non-consensual. The issue of consent is nuanced, especially in circumstances where there was no protest or resistance but conduct which appears to indicate consent. This is exacerbated by [WR]'s age, being [under 15] at the time; the law presumes he can do no evil (*doli incapax*)

[24] It is submitted by the defence that the issue of seriousness is a neutral factor.

[25] The arguments of counsel in this regard were those raised in an application to dismiss the charges pursuant to s 147 of the Criminal Procedure Act 2011 before Judge Recordon. That application was rejected:[14]

> [76] The prosecution case is that the complainant did not consent, [WR] knew he didn't consent or at least he did not reasonably believe that he consented, and he knew in each instance that it was wrong or contrary to law. The prosecution case largely relies on the fact finder accepting the complainant's version of events. I agree with the Crown's submission that this is not a caser where the complainant has been manifestly discredited or is so unreliable that it would be unjust for the trial to proceed. The question of the complainant's credibility and reliability are matters for the fact finder I am satisfied that there is evidence that, if accepted by the fact finder, could establish [WR]'s liability for each of the charges he faces. The application under s 147 is also dismissed.

[26] As evidential sufficiency has been established, the question is whether at face value the allegations are serious. To embark on an analysis as suggested by the

[14] *New Zealand Police v [WR]*, at n1, at [76].

defence, which involves an assessment of reliability and credibility, risks embarking on a mini trial.

[27] This case involves allegations of sexual violation involving oral and anal connection. The allegations are serious regardless of whether a s 282 discharge might ultimately result. Whether that happens depends on several factors including [WR] undertaking significant rehabilitative steps.

The Public interest

[28] It is submitted by the defence that the public interest is a neutral factor. That is on three bases. First, "the public has no interest in prosecuting children under 14." Second, there are "real concerns the Crown could prove lack of reasonable grounds for belief in consent." Third, the potential penalty is not significant.

[29] I consider it is in the public interest that serious sexual offending is the subject of a trial despite [WR]'s age at the time. Protection is afforded to [WR] in that regard by the Crown having to prove he knew the wrongfulness of his actions.

[30] It may be after hearing the evidence the Court decides the Crown has not negated that [WR] had no reasonable grounds to believe that [PG] consented to the sexual activity. However, as discussed above, once the issue of evidential sufficiency has been satisfied, this is not a relevant factor in the assessment of the discretion.

[31] It is also in the interests of the complainant that the matter proceeds to trial. In *R v M* the Court of Appeal said:[15]

> …there are strong policy reasons against dismissing charges of sexual offending solely for delay. It takes courage and emotional strength for complaints of sexual abuse to come forward. To stay proceedings solely on the basis of delay is to require complainants to report incidents before being psychologically prepared for the consequences of doing so."

[32] The delayed complaint is also of considerable significance. Thirty-one months of the overall delay of forty seven months is due to the delay in [PG] making a

[15] *R v M*, above n7, at [54]

complaint to the police. It represents two thirds of the overall delay. This weighs heavily against dismissal.

Prejudice

[33] It was submitted by counsel for [WR] that there is both general and specific prejudice caused by delay. First, the stress of [WR] facing charges since about May 2020. Second, that [WR] was suspended from [school name deleted] in February 2020 and was home schooled for the rest of the academic year. Third, that [WR]'s developmental advances both in terms of maturity and education would adversely impact him on the issue of what he appreciated at the time of the offending.

[34] These arguments were rejected at the first s 322 hearing.[16] I do not consider the additional passing of time since that hearing advances the defence case. I bear in mind that [WR] has elected to remain in the Youth Court. The issue of prejudice from developmental advances will be considered by the presiding Judge. I also note that [WR] has been enrolled at a school since the start of this academic year. The defence have not been able to point to any specific prejudice such as the loss of potential evidence or witness unavailability.

[WR]'s age

[35] It is submitted that as [WR] was [under 15] at the time of the alleged offending is a factor weighing in favour of dismissal. It is submitted the present case is distinguishable from other cases in which a dismissal was refused as those cases involved older defendants.[17] Reliance is placed on the comments of the Supreme Court in *H v R*:[18]

> [34] The above factors may mean that it is inappropriate to try a person for an offence allegedly committed as a child or young person after unnecessary or undue delay. This would particularly be the case where the offence was committed when the person was very young or if the offending was not serious. Even where the alleged offending was serious, however, youth justice principles may still mean that the discretion to dismiss a charge under s 322 should be exercised. This would especially be the case where there is good reason to consider the person has been rehabilitated (for example where there has been a long period without any serious offending).

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[16] *New Zealand Police v [WR]*, above n1, at [36] – [38].
[17] *H v R, above* n12, involved a 16 year old defendant, *R v DG,* above n5, involved a 16 year old defendant.
[18] *H v R,* at n12, at [34].

[36] It is also submitted that, unlike the defendant in *H v R*, [WR] has led a blameless life since the allegations. From the lay advocate report it appears [WR] is excelling at school.

[37] Despite the [WR]'s young age and progress, I consider that the charges should not be dismissed. The allegations are serious. Additionally, despite [WR]'s progress at school, there are no reports that he has been rehabilitated despite there being no further allegations.

[38] Having regard to the mandatory factors set out in s 4A(2) of the Act, I consider that the public interest, the interests of the victim and the principle of accountability weighs against dismissing the charges. This outweighs the well-being and best interests of [WR] in dismissing the charges.

[39] For those reasons the application is dismissed.

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Judge S Patel
District Court Judge

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